Supreme Court, U.S.
FILED
APR 4 2001
CLERK

(5)

No. 00-1146

IN THE
Supreme Court of the United States

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

Sanford M. Stein
Leo P. Dombrowski
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive
Chicago, IL 60606-1229
(312) 201-2000

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

Date: April 4, 2001

AMERICAN FINANCIAL PRINTERS • WASHINGTON, DC • (202) 457-0030

13pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 3

I. CBE'S EFFORTS TO DISTINGUISH *FOGERTY* ARE UNAVAILING 3

II. BOTH THE STATUTORY LANGUAGE AND THE LEGISLATIVE HISTORY OF ENVIRONMENTAL FEE-SHIFTING PROVISIONS SUPPORT THE STEEL COMPANY'S CONTENTION THAT PREVAILING DEFENDANTS ARE TO BE PLACED ON AN EQUAL FOOTING WITH PREVAILING PLAINTIFFS . . 5

III. UNDER THE DUAL FEE-AWARD STANDARD, THE BUSINESS COMMUNITY FACES ENORMOUS FINANCIAL PRESSURE TO SETTLE ENVIRONMENTAL CITIZEN SUITS WITHOUT REGARD TO THE MERITS OF SUCH SUITS 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases:

Christiansburg Garment Co. v. EEOC,
434 U.S. 412 (1978) 2, 3, 4, 5
Fogerty v. Fantasy, Inc.,
510 U.S. 517 (1994) 1, 3, 4, 5
Gwaltney of Smithfield v. Chesapeake Bay Found.,
484 U.S. 49 (1987) 5
Hallstrom v. Tillamook County,
493 U.S. 20 (1989) 5
Natural Resources Defense Council, Inc. v. Train,
510 F.2d 692 (D.C. Cir. 1975) 7
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986) 1, 2
Ruckelshaus v. Sierra Club,
463 U.S. 680 (1983) 7
Willy v. Coastal Corp.,
503 U.S. 131 (1992) 10

Statutes and Miscellaneous:

Clean Air Act 6, 7
§ 304(d), 42 U.S.C. § 7604(d) 6
Copyright Act of 1976 . . . . . 2, 3, 4
17 U.S.C. § 505 2
Emergency Planning and Community Right-to-Know Act (EPCRA) 2, 6, 9
42 U.S.C. § 11046(f) 2, 5, 6

Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990) 9

S. Rep. No. 1196, 91st Cong., 2d Sess. (1970) . . . 6, 7

REPLY BRIEF FOR PETITIONER

Respondent Citizens for a Better Environment ("CBE") does not take issue with the principal contentions made in the Petition. It does not contest that the fee-shifting provision of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11046(f), does not distinguish between prevailing plaintiffs and prevailing defendants and contains no language suggesting that prevailing defendants are any less deserving of fees than prevailing plaintiffs. Nor does CBE dispute that the Court, when faced with virtually identical language in the fee-shifting provision of the Copyright Act of 1976, 17 U.S.C. § 505, held that prevailing defendants should be placed on an equal footing with prevailing plaintiffs in determining whether an award of fees is warranted. *Fogerty v. Fantasy,* 510 U.S. 517, 534 (1994). CBE does not dispute that the Court decision upon which the Seventh Circuit principally relied, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546 (1986), involved a prevailing plaintiff, not a prevailing defendant; addressed the proper size of the plaintiff's fee award, not the issue whether an award was warranted; and is silent on the issue of whether prevailing plaintiffs and prevailing defendants in environmental cases should be treated differently with respect to fee requests. Finally, CBE does not deny that, in sharp contrast to the pattern under civil rights statutes, a substantial majority of suits filed under environmental citizen-suit provisions is filed by well-established environmental groups that tend to file many such cases.

Because it cannot avoid making those concessions, CBE attempts simply to foreclose any consideration of The Steel Company's claims by asserting that the Question Presented by the Petition has already been decided against The Steel Company. Opp. Br. 11-18. But as noted above and in the Petition, the facts in *Delaware Valley* are so far afield from

the facts here that that case cannot reasonably be viewed as having decided the Question Presented. CBE's reliance on *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412 (1978), is similarly misplaced. *Christiansburg* adopted a "dual standard" in *civil rights* fee-award cases: prevailing civil rights plaintiffs are presumptively entitled to fee awards, while prevailing defendants are entitled to fees only if they can demonstrate that the plaintiff's suit was "frivolous, unreasonable, or without foundation." *Christiansburg,* 434 U.S. at 421. But CBE errs in asserting that *Christiansburg* established a general approach for determining fee awards under all federal fee-shifting statutes; the Court's decision in *Fogerty* makes clear that the *Christiansburg* approach is not necessarily applicable outside the context of civil rights cases.

CBE also relies on the absence of any direct conflict among the federal appeals courts regarding the Question Presented. CBE is correct, as we recognized in the Petition, that the Seventh Circuit's approach is consistent with that of the only other circuit to have addressed that question directly -- the Ninth Circuit. But as we explained in the Petition, the Seventh and Ninth Circuits reached their conclusions not on the basis of any legal analysis, but because they have been confused by the Court's decision in *Delaware Valley*. Both appeals courts have erroneously interpreted *Delaware Valley* as precluding them from considering any arguments against application of the *Christiansburg* dual standard in environmental citizen suits. Because, for whatever reason, the appeals courts do not feel at liberty to address the issue themselves, this Court is the only possible source of guidance on the issue.

The exceptional importance of the Question Presented is demonstrated by the filing of *amicus curiae* briefs in

support of the Petition by the State of California Auto Dismantlers Association, the Pacific Legal Foundation, the Chemical Industries Council of Illinois, the Mid-America Legal Foundation, and the Illinois Manufacturers Association. Thousands of businesses each year find themselves the target of citizen suits filed under the federal environmental laws; whether fees are to be awarded in such cases on an even-handed basis to prevailing plaintiffs and prevailing defendants plays a substantial role in the disposition of such suits. This Court has not previously supplied an answer; review is warranted to provide the business and environmental communities with the answer they so desperately need.

I. CBE'S EFFORTS TO DISTINGUISH *FOGERTY* ARE UNAVAILING

The decision below directly conflicts with this Court's decision in *Fogerty*. In construing fee-shifting language in the Copyright Act that is virtually identical to the fee-shifting language at issue here, the Court held that the Copyright Act's fee-shifting language "gives no hint that successful plaintiffs are to be treated differently from successful defendants." *Fogerty*, 510 U.S. at 522. Based on that language, the Court held that the Copyright Act required fee petitions from prevailing defendants and fee petitions from prevailing plaintiffs to be placed on an equal footing. *Id.* at 534.

CBE's efforts to distinguish *Fogerty* are unavailing. CBE disputes our assertion that the relative wealth of Copyright Act plaintiffs (in relation to civil rights plaintiffs) played a significant role in *Fogerty*'s decision not to extend the *Christiansburg* dual fee-award standard outside the context of civil rights cases. Opp. Br. 17-18. But CBE fails to address the relevant language from *Fogerty* that we cited

in the Petition. For example, *Fogerty* explained that *Christiansburg* adopted a dual standard in civil rights fee-shifting cases in substantial part because many civil rights plaintiffs are "impecunious" and because Congress intended to "redress the balance in part" between poor plaintiffs and "defendants with more resources" "by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney fees" -- and thereby encourage the filing of more civil rights suits. *Fogerty*, 510 U.S. at 524. In contrast, the Court noted, Copyright Act plaintiffs are far less likely than civil rights plaintiffs to be poor; "[e]ntities which sue for copyright infringement as plaintiffs can run the gamut from corporate behemoths to starving artists." *Id.*

CBE does not seriously challenge our assertion that the financial profile of the typical plaintiff in environmental citizen-suit litigation has far more in common with the typical Copyright Act plaintiff than the typical civil rights plaintiff. As we demonstrated in the Petition, virtually all environmental citizen-suit litigation is initiated by relatively large environmental organizations. Indeed, CBE -- one of the smaller organizations that regularly engages in such litigation -- admits to annual revenues in the $2 million range. Opp. Br. 18.[1]

CBE's only response is to note that its annual revenues are less than those of The Steel Company. Opp. Br. 17-18.

---

[1] According to its IRS (Form 990) filing for fiscal year 1999, CBE had revenues in excess of $2 million. *See* Brief of *amici curiae* Pacific Legal Foundation ("PLF"), *et al.*, at 18. PLF also inspected the Form 990s of four other environmental groups that play a prominent role in environmental citizen-suit litigation; their annual revenues ranged from $18 million to $111 million, and their net assets ranged from $14 million to $133 million. *Id.* at 18-19.

But that response does not address *Fogerty*'s rationale, which is that there is no reason to presume that Congress intended to create a dual fee-award standard in favor of prevailing plaintiffs if the financial resources of the typical plaintiff bringing suit under the statute at issue are such that an even-handed fee-award standard would not unduly discourage that plaintiff from filing suit.

CBE also attempts to distinguish *Fogerty* on the ground that, in terms of goals and objectives being served, environmental citizen suits have far more in common with the civil rights suits at issue in *Christiansburg* than the Copyright Act suits at issue in *Fogerty*. Opp. Br. 12-14. But CBE fails to address the decisions of this Court, cited in the Petition, that indicate that the role of the plaintiff in an environmental citizen suit is far different from the role of the plaintiff in a civil rights suit. *See* Pet. 22-24 (discussing *Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987), and *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989)).

The decision below cannot be squared with this Court's decision in *Fogerty*. Review is warranted to resolve that conflict.

II. BOTH THE STATUTORY LANGUAGE AND THE LEGISLATIVE HISTORY OF ENVIRONMENTAL FEE-SHIFTING PROVISIONS SUPPORT THE STEEL COMPANY'S CONTENTION THAT PREVAILING DEFENDANTS ARE TO BE PLACED ON AN EQUAL FOOTING WITH PREVAILING PLAINTIFFS

Perhaps the most striking feature of CBE's opposition brief is that it contains absolutely no discussion of the statutory language at issue. Section 11046(f) provides that in

an EPCRA case, a district court "may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate." Review is warranted in order to resolve whether the Seventh Circuit was justified in reading a dual fee-award standard into the party-neutral language of § 11046(f).

CBE makes no attempt to explain the Seventh Circuit's decision in terms of the language of § 11046(f). Rather, CBE presents a selective reading of the legislative history of other environmental statutes in support of its counter-textual assertion that Congress intended to create a dual fee-award standard under EPCRA. Opp. Br. 16. For example, CBE relies on a snippet from the legislative history of the Clean Air Act in support of its position:

> [T]he Senate Report on the Clean Air Act, which provides for fee awards to "any party, whenever the court determines such award is appropriate" (Section 304(d); 42 U.S.C. § 7604(d)), explains that this section allows courts to award fees "to defendants where the litigation was obviously frivolous and harassing. This should . . . discourag[e] abuse of this provision, while at the same time encouraging the quality of the actions that will be brought." S. Rep. No. 1196, 91st Cong., 2d Sess. 38-39 (1970).

Id. CBE has distorted the meaning of the passage in the Senate Report by providing only a partial quotation. When read in its entirety, the passage makes clear that a lawsuit that was "frivolous and harassing" was one instance in which a court "could" award fees to a prevailing defendant, not (as CBE suggests) that such suits were the *only* instance in which such a fee award would be appropriate:

> The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing.

S. Rep. No. 1196, 91st Cong. 2d Sess. 36-39 (1970) (quoted in *Natural Resources Defense Council, Inc. v. Train,* 510 F.2d 692, 725 (D.C. Cir. 1975)).

Indeed, as we pointed out in the Petition (at 20-21) and as the Court has found (in *Ruckelshaus v. Sierra Club,* 463 U.S. 680, 692-93 (1983)), the legislative history of the Clean Air Act indicates that the Act's fee-shifting provision was added as a means of assisting prospective *defendants,* not prospective plaintiffs. Because the "central purpose" (*id.*) of fee-shifting provisions in environmental statutes is to cut down on the number of meritless citizen suits being filed, such provisions cannot fairly be interpreted as favoring plaintiffs over defendants. CBE's efforts to distinguish *Ruckelshaus* (Opp. Br. 14-15) are unavailing. *Ruckelshaus* was unequivocal in finding that the primary reason for adding a fee-shifting provision to the Clean Air Act was to protect defendants from meritless suits. *Id.* at 692-93. CBE is correct, of course, that the provision had the additional purpose of encouraging the filing of meritorious citizen suits (Opp. Br. 20); otherwise, there would have been no reason to permit the award of fees to prevailing environmental plaintiffs. But there can be no justification for interpreting a fee-shifting statute as favoring plaintiffs over defendants when it was adopted at the insistence of those who sought to provide a benefit to defendants.

III. UNDER THE DUAL FEE-AWARD STANDARD, THE BUSINESS COMMUNITY FACES ENORMOUS FINANCIAL PRESSURE TO SETTLE ENVIRONMENTAL CITIZEN SUITS WITHOUT REGARD TO THE MERITS OF SUCH SUITS

The Petition explains at length how lower courts' adoption of a dual fee-award standard in environmental citizen suits has transformed such suits from the supplemental enforcement mechanism envisioned by Congress into a shakedown system under which companies must pay tribute to environmental groups as a cost of doing business. Pet. 28-30.

In response, CBE suggests that The Steel Company has exaggerated the burden imposed on the business community by environmental citizen suits. Opp. Br. 18-20. CBE notes, for example, that the number of environmental citizen suits filed against private entities has actually declined somewhat over the past six years. *Id.* at 18-19 n.4. But that trend is of little consolation to the business community if, as The Steel Company asserts, the level of environmental litigation against private companies has been at a very high level throughout the past decade. CBE does not challenge The Steel Company's assertions that environmental citizen suits did not exist at all prior to 1970, and that there has been an "explosion" in the number of such suits as compared to litigation levels in the early 1980s.

Moreover, the number of suits actually filed does not begin to tell the whole story. Many companies pay substantial settlements to environmental groups that send them the required 60-day advance notice of intent to sue, even without any lawsuit being filed. Such settlements, which are not reflected in the litigation figures cited by CBE,

impose a significant burden on the business community. *See* Michael S. Greve, *The Private Enforcement of Environmental Law,* 65 TUL. L. REV. 339 (1990).

CBE does not contest The Steel Company's assertion that in all but one of the reported decisions involving citizen suits brought under EPCRA against non-governmental defendants, the plaintiff was an environmental group, not an individual. Pet. 25. CBE responds by pointing to the number of reported decisions identified by The Steel Company (nine) as evidence that we have exaggerated the burden imposed on the business community by environmental citizen suits. But the number of reported decisions obviously bears little relation to the total number of EPCRA cases that have been filed. Many lawsuits do not result in any written decision; and even when the presiding judge writes a decision (s)he more often than not will decide not to publish the decision in an official reporter. As noted in the Petition, one environmental group, the Atlantic States Legal Foundation, claims to have litigated "hundreds of successful EPCRA and Clean Water Act cases." Pet. 25 n.10. Moreover, as noted above, as is true of other environmental statutes, the number of lawsuits filed under EPCRA does not reflect the burdens imposed on companies forced to enter into settlements with environmental groups after receiving a 60-day notice-of-intent-to-sue letter but before suit is actually filed.

CBE also contends that the situation faced by environmental citizen suit defendants is no different from the situation faced by all other civil defendants: "[A]ll civil defendants can claim that their inability to recover attorney's fees under the ordinary "American Rule" creates settlement pressure, even in cases they might consider to be winnable." Opp. Br. 20. But as we explain in the Petition, it is not merely the inability to recover fees that creates the pressure

for defendants to settle. Under the dual fee-award standard endorsed by the Seventh Circuit, environmental defendants must also factor in the possibility (no matter how slight) that the plaintiff will prevail -- thereby exposing the defendant to substantial fines *and* the prospect of paying the plaintiff's attorney fees as well as his own.[2]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Sanford M. Stein
Leo P. Dombrowski
WILDMAN, HARROLD,
ALLEN & DIXON
225 West Wacker Drive
Chicago, IL 60606-1229
(312) 201-2000

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

Dated: April 4, 2001

---

[2] CBE also argues that review should be denied because there is no subject matter jurisdiction in the federal courts to hear The Steel Company's fee petition. Opp. Br. 20-22. The Seventh Circuit quite rightly rejected that contention, basing its decision on this Court's decision in *Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992). CBE is quite correct that there is a circuit split on this jurisdictional issue and that the Seventh Circuit arrived at its decision after explicitly rejecting the holdings of three other circuits. Pet. App. 8a-9a. But that split in authority does not render this case any less worthy of review; to the contrary, it provides an additional reason for review if the Court is inclined to resolve the conflict over the jurisdictional issue.